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No. 97-369

In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION OF THE NATIONAL ORGANIZATION OF WOMEN AND BLACKS IN GOVERNMENT FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION OF THE NATIONAL ORGANIZATION OF WOMEN AND BLACKS IN GOVERNMENT FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

Pursuant to Rule 37.2(b), the National Organization of Women and Blacks in Government move for leave to file the attached brief *amici curiae* in support of the Petition for Certiorari.

We are filing this motion because, despite our best efforts, we have not yet received written consents from all of the parties to the proceeding listed in the jurisdictional statement submitted in this case on behalf of Appellant. While consents have been received from most such parties, Intervenor Defendant Californians Against Discrimination and Preferences has specifically declined to consent.

INTEREST OF THE *AMICI CURIAE*

Amicus Curiae California National Organization for Women is a grassroots, political organization focused on achieving equality for women. Activities include lobbying, electing feminists into office at all levels, community awareness and activities, education, and publicity on women's rights issues. There are approximately 48 chapters across the state, with a headquarters office in Sacramento. Since 1966, NOW has been a volunteer-driven organization with members in every state and national headquarters in Washington, D.C. NOW works on a wide range of women's equality issues, including affirmative action, economic rights, the Equal Rights Amendment, reproductive rights, health care, lesbian/gay/bi rights,

civil rights, eliminating racism, early childhood development, older women's rights, homemakers' rights, violence against women, education, and more. Because affirmative action is an important tool for remedying discrimination and ensuring equal opportunity for women, CA NOW actively opposed Proposition 209.

Amicus Curiae Blacks in Government (BIG) is a national nonprofit membership organization incorporated in Washington, D.C. in 1976. BIG is comprised of more than 250 chapters, and seeks to represent the interests of more than 2.5 million African Americans employed by federal, state and local government agencies. BIG has sought to promote excellence in government through equality of opportunity and to promote the elimination of all vestiges of racism and discrimination. BIG believes affirmative action is necessary to remedy the effects of historic and institutionalized discrimination and to ensure equal opportunity for persons of color in public employment.

The intent of these *amici* is to cast further light upon the last issue advanced in the petition for certiorari: whether states may enact laws that impede Title VII's national policy of encouraging state and local governments to adopt properly supported and narrowly crafted affirmative action plans as a means of remedying prior and possibly ongoing discrimination.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

Amicus Curiae California National Organization for Women is a grassroots, political organization focused on achieving equality for women.[1] Activities include lobbying, electing feminists into office at all levels, community awareness and activities, education, and publicity on women's rights issues. There are approximately 48 chapters across the state, with a headquarters office in Sacramento. Since 1966, NOW has been a volunteer-driven organization with members in every state and national headquarters in Washington, D.C. NOW works on a wide range of women's equality issues, including affirmative action, economic rights, the Equal Rights Amendment, reproductive rights, health care, lesbian/gay/bi rights, civil rights, eliminating racism, early childhood development, older women's rights, homemakers' rights, violence against women, education, and more. Because affirmative action is an important tool for remedying discrimination and ensuring equal opportunity for women, CA NOW actively opposed Proposition 209.

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[1] The law firm of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, A Professional Corporation, made a monetary contribution to the preparation of this brief.

through equality of opportunity and to promote the elimination of all vestiges of racism and discrimination. BIG believes affirmative action is necessary to remedy the effects of historic and institutionalized discrimination and to ensure equal opportunity for persons of color in public employment.

INTRODUCTION

The intent of these *amici* is to cast further light upon the last issue advanced in the Petition for Writ of Certiorari: whether states may enact laws that impede Title VII's national policy of encouraging state and local governments to adopt properly supported and narrowly crafted affirmative action plans as a means of remedying prior or possibly ongoing discrimination. We will argue that the reasoning and holding of the court below ignore the thrust of this Court's prior decisions which declare that policy, that the policy is well founded in the realities of the workplace, and that Proposition 209 should be held invalid because it stands as an obstacle to the full implementation of federal law. In addition to the other important reasons advanced by petitioner, this Court should grant *certiorari* in order to address and clarify the answer to this critical question.

ARGUMENT

I.

THE REASONING AND HOLDING OF THE COURT BELOW IGNORE THE THRUST OF THIS COURT'S PRIOR DECISIONS WHICH RECOGNIZE THE ENCOURAGEMENT OF PROPERLY CRAFTED AND PROPERLY SUPPORTED REMEDIAL AFFIRMATIVE ACTION PLANS AS AN IMPORTANT ASPECT OF FEDERAL POLICY UNDER TITLE VII.

In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the justices who voted to uphold Santa Clara County's affirmative action plan under Title VII disagreed about what should be required as a predicate for a permissible plan, but they did not disagree upon the importance of permissible plans to congressional objectives.

Justice Brennan's opinion for the Court in *Johnson* referred to the Court's prior opinion in *United Steelworkers v. Weber*, 433 U.S. 193 (1979) as "grounded in the recognition that *voluntary action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace.*" 480 U.S. at 630 (emphasis added).

Justice Stevens, concurring, recognized that "the challenged employment decision served the *legitimate purpose of creating diversity in a category of employment that had been almost an exclusive province of males in the past.*" *Id.* at 649 (emphasis added).

And Justice O'Connor, while insisting that affirmative action plans be limited to situations in which an employer has a "firm basis for believing that remedial

action was required" (*id.* at 652), nonetheless emphasized *"the importance of voluntary efforts to eliminate discrimination." Id.* (emphasis added). Justice O'Connor argued, as she had in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 291 (1986) (concurring in part and concurring in judgment) "that a contemporaneous finding of discrimination should not be required [as a predicate for an affirmative action plan] *because it would discourage voluntary efforts to remedy discrimination.*" 480 U.S. at 652 (emphasis added).

Properly supported and properly crafted affirmative action plans are especially important to the goals of Title VII – and for that matter to the goals of the Fourteenth Amendment – in the public sector. As Justice O'Connor observed in *Wygant*:

> "The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance." (*Wygant, supra*, 476 U.S. at 290 (O'Connor, J. concurring in part and concurring in judgment))

At least since *Adarand Constructors v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), it has been clear that an affirmative action plan in the public sector must meet strict scrutiny requirements imposed by the Fourteenth Amendment upon racial classifications, but Justice O'Connor's opinion for the Court in that case reiterated that remedying prior discrimination will satisfy that test:

> "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this court has set out in previous cases." (132 L.Ed.2d at 188)

What is required as a predicate, it appears, is that there be a "strong basis in evidence for [the public entity's] conclusion that remedial action was necessary", *i.e.*, evidence approaching a *prima facie* case of constitutional or statutory violation (*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989), quoting *Wygant*, 476 U.S. at 277), and the absence of effective race-neutral alternatives (488 U.S. at 507-508).

II.

THE REALITIES OF THE WORKPLACE REQUIRE CONTINUED SUPPORT FOR REMEDIAL AFFIRMATIVE ACTION PLANS, BOTH AS A MEANS OF REMEDYING PRIOR DISCRIMINATION AND AS A CHECK AGAINST DISCRIMINATION WHICH MAY BE ONGOING BUT DIFFICULT TO IDENTIFY AND PROVE.

It is a common argument, and one in fact used by the supporters of Proposition 209, that there would be no need for affirmative action plans if only existing laws against discrimination were properly enforced. This argument overlooks two important realities. One is that there still exist pockets of unremedied past discrimination

which are better addressed voluntarily, through a properly crafted affirmative action plan, than by the costly, time-consuming, and unpredictable process of litigation. The other is that statistical disparities in particular job categories may reflect ongoing discrimination on the part of low- and middle-level management who are themselves not fully aware of the stereotypes which may inform their conduct.

While deliberate discrimination meets with both social and legal disapproval in contemporary America, social science research establishes that to a considerable degree race-based and sex-based stereotypes continue to have a significant negative impact upon the way managers evaluate the qualifications of minority individuals for various positions. *See generally*, Linda Hamilton Krieger, "The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity," 47 Stan. L. Rev. 1161, 1186-1188 (1995). *See also* Declaration of Marc Bendick, Jr., Ph.D., which is part of the record in this case. (Declaration in Support of Ex Parte Application for T.R.O. and Order to Show Cause Re Preliminary Injunction. Vol. I, pp. 53-85.) Professor Bendick reports that:

> "This dramatic change is what the non-minority public is thinking of when they tell public opinion pollsters that discrimination is no longer a problem. However, our testing studies make clear that they are only partially correct. Employment discrimination is still present, but it expresses itself less in the *treatment* of minorities during the hiring process than in *judgments* concerning their qualifications and abilities." (*Id.* at 75)

Such "unconscious" discrimination is generally beyond the practical reach of anti-discrimination laws on either disparate treatment or disparate impact theories. "[T]he problems of employment discrimination that are typical in the 1990s – [as described in paragraphs 30 through 41 of Professor Bendick's report] – are so subtle and woven into apparently-neutral processes that they are very difficult to isolate, document, and attack through conventional anti-discrimination enforcement alone" (*id.* at 81). Thus, a properly designed affirmative action plan may be the only effective means of counteracting and remedying this form of discrimination.

This was the conclusion of the Federal Glass Ceiling Commission – a 21-member bipartisan body appointed by President Bush and Congressional leaders and chaired by the Secretary of Labor pursuant to the Glass Ceiling Act (Section 204 of Public Law 102-166, the Civil Rights Act of 1991). In its fact-finding report ("Good for Business: Making Full Use of the Nation's Human Capital: March, 1995") the Commission identified as one of the barriers to the advancement of minorities and women in the private sector "conscious and unconscious stereotyping, prejudice, and bias related to gender, race and ethnicity." *Id.* at p. 8. And, in considering what works to overcome these barriers, the Commission stated:

> " . . . [T]he top leadership team of any business intent on change must communicate its desire down the line and then support its message with clearly defined expectations. Accountability reinforces the message from the top that progress toward inclusiveness is being assessed and will be rewarded. *Managers must be held accountable for the development and advancement of*

> *minorities and women. Goals and timetables must be agreed upon, measurable results must be established, and incentives, rewards, and penalties must be tied to performance in meeting the goals and achieving results."* (*Id.* at p. 42 (emphasis added))

While the Commission's observations focus on the private sector, there is no reason to believe that the situation in the public sector is any different. *See* Bendick Declaration, *supra*, pp. 62-67.

III.

PROPOSITION 209 SHOULD BE HELD INVALID BECAUSE IT STANDS AS AN OBSTACLE TO THE FULL IMPLEMENTATION OF FEDERAL LAW.

Proposition 209 purports to ban affirmative action programs which are both constitutionally permissible under *Croson* and important to the policies of Title VII as recognized under prior decisions of this Court. It would subject governmental entities seeking to remedy their own prior or ongoing discrimination to the precise dilemma which Title VII seeks to avoid. *See Weber*, 443 U.S. at 291 (Blackmun, J., concurring (absent permissible affirmative action "public employers are trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent employment discrimination and liability to minorities if affirmative action is taken.") As the district court observed, "voluntary affirmative action affords [employers] a safe passage" between these competing hazards. 946 F. Supp. at 516. Proposition 209 "obstructs the passageway and forces many employers into a place akin to the Strait of

Messina where they confront the Scylla of Title VII and the Charybdis of Proposition 209." 946 F. Supp. at 517.

In addition to the dilemma it poses for local government entities, who face conflicting directives under Title VII and Proposition 209 and must pay their own bills in the event liability is determined, Proposition 209 tends to defeat major objectives of the federal statute. Under this court's Equal Protection Clause decisions, affirmative action plans are valid only in a narrow range of circumstances, where there exists a compelling governmental interest such as remedying prior discrimination, where the plan is narrowly tailored to those interests, and where race-neutral alternatives are likely to be ineffective.

As the State conceded and the Circuit Court found, Proposition 209 would ban *constitutionally permissible* affirmative action programs which satisfy *Croson*, thus precluding voluntary remedial affirmative action *precisely in those situations where it is most needed* as a means of effectuating the policies of Title VII and the Equal Protection Clause. *Cf. Local 29 v. EEOC*, 478 U.S. 421, 448-49 (1986) (race-conscious affirmative action "may be the only effective way to ensure the full enjoyment of the rights protected by Title VII"). The result in such circumstances will be the maintenance of a *status quo* which perpetuates historic patterns of discrimination which it is the purpose of Title VII to eradicate. *Cf. e.g., Weber, supra*, 433 U.S. at 198-99 (without affirmative action requirement of prior craft experience from which Blacks had been excluded would perpetuate historic patterns of discrimination). As the Equal Opportunities Commission has recognized in its Guidelines:

> "Voluntary affirmative action to improve opportunities for minorities and women *must be encouraged and protected* in order to carry out the Congressional intent embodied in title VII." (29 C.F.R. Sec. 1608.1(c) (emphasis added))

In preserving an area for voluntary affirmative action plans to operate, Congress and this Court have established a careful balance between two conflicting concerns: Congress' intent "to root out invidious discrimination against any person on the basis of race or gender, and its goal of eliminating the lasting effects of discrimination against minorities." *Johnson, supra*, 480 U.S. at 649 (O'Connor, J. concurring). *Local 209* would dramatically upset that balance, contrary to Congressional policy. *Cf. Lodge 76, International Assoc. of Machinists v. Wisconsin Employment Relations Comm.*, 437 U.S. 232 (1976).

Congress, through Sections 708 and 1104 of the Civil Rights Act (42 U.S.C. §§ 2000e-7 and 2000h-4), incorporated into that Act well-established principles of conflict preemption: where Congress has not expressly provided for preemption and has not completely displaced state regulation by occupation of the field, federal law may nonetheless preempt state law to the extent that it actually conflicts with federal law. Such a conflict occurs either because 'compliance with both federal and state regulations is a physical impossibility', *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." *California Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 281 (1987). Section 708 reflects the *Florida Lime*

principle: while declaring a general policy of non-preemption, it provides for preemption of any state law "which purports to require or permit the doing of any act which would be an unlawful employment practice"; and Section 1104, while disclaiming Congressional intent to occupy the field, nonetheless precludes enforcement of state law "inconsistent with any of the purposes of this Act or any provision thereof."

This Court's opinion in *Guerra* makes quite clear that a state law must pass *both* tests. The opinion stated the issue under Sections 708 and 1104 was "whether the California statute requires or permits employers to violate Title VII, as amended by the PDA, *or is inconsistent with the purposes of the statute.*" 479 U.S. at 283 (emphasis added). Its conclusion was that the California statute was not preempted "because it is not inconsistent with the purposes of the federal statute, nor does it require the doing of any act which is unlawful under Title VII." *Id.* at 292. Justice White's dissenting opinion likewise assumed that Section 1104 applied. 479 U.S. at 304, n.12 (White, J. dissenting). Only Justice Scalia was of the view that Section 708 controlled. 479 U.S. at 295 (Scalia, J. concurring). And subsequent case law confirms this dual approach. *Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 209 (1991).

IV.

THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO CLARIFY THE APPLICATION OF TITLE VII TO REMEDIAL AFFIRMATIVE ACTION PROGRAMS.

The opinion of the Court of Appeals in this case entirely ignores the body of jurisprudence discussed above. Indeed, it totally misconceives the nature of the preemption argument. As to Section 708, the court observed that Proposition 209 "does not remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII." As to Section 1104, the court proclaimed that Section 703(j) of Title VII "conclusively demonstrates that Proposition 209 is entirely consistent" with the federal statute. On that ground, the court found it unnecessary to consider whether the EEOC's Guideline declaring the importance of affirmative action to the achievement of Congressional objectives was entitled to deference.

Section 703(j), however, merely makes clear that Title VII (absent court order) does not *require* an employer to grant preferential treatment in order to comply with the statute. As interpreted by the Supreme Court in *Weber*, that section does not in any way *prevent* an employer from voluntarily adopting an affirmative action program under appropriate circumstances, nor is it in any way that such conduct inconsistent with the principle declared in those cases is in fact *encouraged* by the goal of Title VII to "break down old patterns of racial segregation and hierarchy" (*Weber*, 443 U.S. 205-206), and to do so through voluntary compliance, the "preferred means of achieving

the objectives of Title VII." *Local 93, International Assoc. of Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986).

The reasoning of the court below is explicable only on the assumption that what this Court, other federal courts, and the EEOC have said about the importance of affirmative action to the achievement of Congressional goals has no meaning. Viewed in that light, the opinion has implications far beyond the validity of Proposition 209. This Court has not decided a case involving the relationship between Title VII and affirmative action plans since *Johnson*. The pending case of *Piscataway, N.J. Township Board of Education v. Sharon Taxman*, No. 96-679, provides an opportunity for this Court to address that relationship in the context of a non-remedial plan. Remedial plans are far more common, however, and this case provides an opportunity for this Court to clarify the primary policy of Title VII in this important area.

CONCLUSION

For all the reasons above, the Court should grant certiorari and review the Ninth Circuit's decision below.

Respectfully submitted,

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